IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMAD FARAHMAND	:	CIVIL ACTION
	:	
v.	:	
	:	
WILLIAM S. COHEN and LT. GENERAL HENRY T. GLISSON	:	NO. 97-7952

MEMORANDUM AND ORDER

HUTTON, J. February 10, 1999

Presently before the Court are Defendants William S. Cohen and Henry T. Glisson's Motion for Summary Judgment (Docket No. 10), Plaintiff Ahmad Farahmand's Response (Docket No. 11), Defendants' Reply Brief (Docket No. 17), and Plaintiff's Surreply Brief (Docket No. 18). Also before the Court are Defendants' Motion in Limine (Docket No. 16), Plaintiff's Response (Docket No. 19), Defendants' Reply Brief (Docket No. 20), and Plaintiff's Surreply Brief (Docket No. 21). For the reasons stated below, the Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART** and Defendants' Motion in Limine is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. Defense Supply Center Philadelphia

("DSCP") provides medical supplies, food, clothing, and other materials to agencies of the federal government. Plaintiff Ahmand Farahmand worked at DSCP. On December 12, 1996, the position of Supervisory Product Business Specialist ("Section Chief") opened in the Medical Material Directorate at DSCP. As advertised, the position entailed planning, directing, and supervising operations providing medical supplies to agencies of the federal government.

The "Selecting Official" for the position was Paul J. Bellino. In December 1996, Bellino convened a panel of three DSCP supervisors to attend interviews and recommend four finalists. Bellino would then select the new Section Chief. Bellino chose Leo Coyle, Carl Maunz, and Roslyn Rogers to serve on the panel. In December 1996, Bellino also drafted interview questions. Bellino also established the following factors, with varying importance, to make the decision: interview, experience, performance rating, awards, and education. The interview was the most significant factor.

On January 21, 1997, DSCP's personnel office referred thirteen (13) applicants, including the Plaintiff, to Bellino as qualified for further consideration for the position. Bellino reviewed the applications. In a summary rating sheet, Bellino then rated the applicants based upon his assessment of the candidates' qualifications as taken from the applications. Bellino rated the Plaintiff as "Excellent" in the categories of experience,

performance rating, and education. Prior to the interviews, Bellino distributed his summary rating sheet to each panel member.

After the interviews, the panel recommended four candidates: Bruce Carson, John Charalabidis, Robert Little, and James Johanson. In making the final determination, Bellino considered only these four individuals. Bellino selected John Charalabidis for the position. On February 28, 1997, Plaintiff received notice that he was not selected for the position.

On April 30, 1997, Plaintiff timely filed a formal complaint of discrimination with DSCP. In the complaint, Plaintiff alleged that DSCP discriminated against him by not promoting him to Section Chief because of his age, religion, and date of birth. DSCP performed an investigation and found no discrimination. Thus, on December 23, 1997, Plaintiff filed the instant action alleging that DSCP discriminated against him based upon his: (1) age, under the Age Discrimination in Employment Act (ADEA); (2) national origin, under Title VII of the Civil Rights Act of 1964; and (3) religion, under Title VII of the Civil Rights Act of 1964.

On September 16, 1998, the Defendants filed a motion for summary judgment. On October 15, 1998, the Defendants filed a motion in limine. The Court addresses both motions.

II. DISCUSSION

A. Motion for Summary Judgment

1. Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock

Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. Analysis of Defendants' Motion for Summary Judgment

a. Exhaustion of Administrative Remedies

Defendants first argue that summary judgment should be granted with respect to all adverse employment actions, other than the failure to promote the Plaintiff to Section Chief, because the Plaintiff failed to mention these adverse employment actions in his administrative charge. "It is a basic tenet of administrative law that a plaintiff must exhaust all administrative remedies before bringing a claim for judicial relief." Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). Under Title VII and the ADEA, a plaintiff must file charges with the EEOC and receive a right-to-sue letter before filing a complaint in federal court. See Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976); Rufo v. Metro. Life Ins. Co., No.CIV.A.96-6376, 1997 WL 164267, at *2 (E.D. Pa. Apr. 7, 1997). Because the statutory scheme of Title VII and ADEA stresses conciliation by the EEOC over formal adjudication, there are limitations on the presentation of new claims in the district court. See Ostapowicz, 541 F.2d at 398.

In this case, the Court finds that summary judgment must be granted in Defendants' favor with respect to Plaintiff's allegations of discrimination with regard to denials of training and other selections for promotion other than the failure to promote to Section Chief. Indeed, Plaintiff essentially concedes this point for two reasons. First, Plaintiff failed to raise any

argument against summary judgment with respect to this issue. Second, it appears that Plaintiff acknowledges that his suit only involves the failure to promote him to Section Chief.[1] Therefore, the Court grants Defendants' motion in this respect.

b. McDonnell Douglas Shifting Burden Framework

Defendants next argue that summary judgment should be granted under the McDonnell Douglas shifting burden framework. Religion and national origin discrimination claims brought under Title VII, as well as age discrimination claims brought under the ADEA, are treated under the shifting-burden analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). See Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994). In a case under either Title VII or the ADEA, the legal analysis proceeds in three parts.[2] First, the plaintiff carries the burden of establishing a prima facie case of unlawful discrimination by showing that: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) despite his or her qualifications, the

[1] In his introduction, Plaintiff states that: "Plaintiff claims violations of Title VII and the ADEA in the denial of equal employment opportunity, specifically denial of promotion to the position of Supervisory Product Business Specialist, GS-1101-13, at the Defense Agency." See Pl.'s Mem. of Law. in Opposition to Defs.' Mot. for Summ. Judg. at 1.

[2] The plaintiff has not offered any direct evidence of discrimination. Accordingly, the Court must apply the shifting-burden analysis.

plaintiff was rejected; and (4) the circumstances of the plaintiff's rejection give rise to an inference of unlawful discrimination.[3] See Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 802.

Second, if the plaintiff succeeds in establishing a prima facie case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id.; see also Torre, 42 F.3d at 829. Finally, if the defendant articulates a legitimate reason, the burden rebounds to the plaintiff to show that the reason is a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-08 (1993); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

(1) Prima Facie Case

[3] The fourth prong of the prima facie case is derived from the Supreme Court's decision in Burdine, 450 U.S. at 253. Traditionally, this fourth prong has been formulated as: "after [the] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802. This formulation, however, does not work well when the employer's hiring decisions are made, as in this case, from a pool of applicants, instead of from applicants considered sequentially. See Lex K. Larson, Employment Discrimination § 8.02[6], at 8-46 (2d ed. 1995). "Because in a pool the selection of someone else is simultaneous with the rejection of the plaintiff, the plaintiff obviously cannot show that the position 'remained open' or that the employer has 'continued to seek applicants with the plaintiff's qualifications.'" Id. In McDonnell Douglas, the Supreme Court recognized that the standard for a prima facie case cannot be inflexible because the "facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13. The same flexibility applies in ADEA cases. See Torre, 42 F.3d at 830-31. In light of the Supreme Court's and the Third Circuit's recognition that the prima facie case standard may be flexible, this Court believes that the Burdine formulation is more appropriate in this circumstance than the traditional McDonnell Douglas formulation.

Defendants argue that summary judgment should be granted on the ADEA claim because Plaintiff cannot establish the prima facie case of age discrimination.[4] To establish prima facie case of impermissible discrimination in failure to promote claim under ADEA, a plaintiff must show: (1) that be belongs to protected class, i.e., is at least 40 years of age; (2) that he applied for and was qualified for job; (3) that despite his qualifications he was rejected; and (4) that the employer either ultimately filled position with someone sufficiently younger to permit inference of age discrimination or continued to seek applicants from among those having plaintiff's qualifications. See Gosnell v. Runyon, 926 F. Supp. 493, 496 (M.D. Pa. 1995). The Court notes that the Defendants do not contest the first three prongs, but argue that the Plaintiff cannot show that the position ultimately went to a person sufficiently younger to permit an inference of age discrimination.

This Court disagrees. A plaintiff under the ADEA need not show that the successful candidate was someone who was not in the protected class, i.e. below age 40. See Barber v. CSX Distribution Servs., 68 F.3d 694, 699 (3d Cir. 1995). All that need be shown is that the beneficiary of the alleged discrimination is "sufficiently younger" to permit an inference of age

[4] The Defendants concede that the Plaintiff satisfied the prima facie case with respect to national origin and religious discrimination under Title VII. See Defs.' Mem. of Law in Support of Mot. for Summ. Judg. at 20.

discrimination. See Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985) ("Courts that have addressed this issue squarely have universally permitted a prima facie case to be shown through proof that the favored person was younger than plaintiff. All have held that the replacement need not be younger than 40, the age at which ADEA protection begins."). There is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination. See id. However, in Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 (3d Cir. 1988), the Third Circuit concluded that nine years difference was sufficient to establish a prima facie case of age discrimination even though the favorably treated employee was also within the protected class. Moreover, in Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit held that five years difference, in addition to substantial evidence of plaintiff's qualifications for the position, was sufficient to establish a prima facie case of age discrimination.

In this case, it is clear that the age difference between Farahmand and the successful four finalists could support a finding that they were "sufficiently younger" than Farahmand to permit an inference of age discrimination. Farahmand was five and eleven years older than two of the finalists. Moreover, Farahmand was twenty-seven years older than the finalist ultimately promoted to the position. These differences, together with the undisputed

existence of the remaining elements of Farahmand's prima facie case, are clearly sufficient to shift the burden of production to the Defendants and require them to articulate a legitimate, non-discriminatory motivation for their failure to promote him. The inference of age discrimination may not be overpowering, but the Court cannot find that, as a matter of law, it is insufficient. Therefore, the Court denies Defendants' motion in this regard.

(2) Pretext

Defendants also contend that, even if the Plaintiff presented sufficient evidence to establish the prima facie case of age discrimination and even though they concede the Plaintiff meets the prima facie case of national origin and religious discrimination, summary judgment should be granted because the Plaintiff failed to present sufficient evidence to demonstrate that their legitimate, non-discriminatory reason was pretextual. In this case, the Defendants state that their legitimate, non-discriminatory reasons for Plaintiff's non-selection was that Mr. Charalabidis was the best candidate for the position and that Farahmand had an "inferior interview." Defendants contend that Plaintiff cannot show this reason was pretextual.

The Third Circuit has stated that to defeat a motion for summary judgment, once the defendant meets its burden of articulating a non-discriminatory reason, the plaintiff must: (1) discredit the proffered reason, either circumstantially or

directly, or (2) adduce evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. See Torre, 42 F.3d at 829; Fuentes, 32 F.3d at 764. The Third Circuit has warned, however, that:

> [T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons."

Fuentes, 32 F.2d at 765 (citations omitted) (emphasis and second alteration in original).

In this case, the Court finds that the Plaintiff demonstrated such "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions" in the Defendants' proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence." Id. In terms of the ADEA, the Plaintiff offered evidence that at least some panelists evaluated candidates based upon "potential" and managerial outlook as it compared with . . . new business trends." Moreover, Bellino required that the panelists give experience much

less weight than other factors such as the interview which evaluated a candidate's "potential" and "outlook." See Smithers v. Bailar, 629 F.2d 892, 896 (3d Cir. 1980) (noting that "potential" is often related to age and may be considered evidence of age discrimination). In terms of Title VII, the Plaintiff offered evidence that at least some panelists believed Farahmand had an "inferior interview" because he "misinterpreted what was being asked." Further, one panelist perceived that Farahmand had a "language difficulty." Yet, another panelist found that Farahmand was "well-spoken." Thus, based upon this evidence, the Court finds a reasonable jury could infer that the employer did not act for the asserted, non-discriminatory reasons. Therefore, the Court denies the Defendants' motion for summary judgment.

B. Motion in Limine

Defendants also filed a motion in limine which raises three arguments. First, Defendants contend that the testimony of Farahmand's alleged superiority as a candidate is irrelevant. Second, Defendants argue that the testimony concerning the performance of Charalabidis after he was selected by the panel for the promotion is irrelevant. Third and finally, Defendants contend that testimony concerning "other alleged incidents of discrimination" are irrelevant and unfairly prejudicial.

Under Federal Rule of Evidence 401, "'relevant evidence' means evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "The standard of relevance established by [Rule 401] is not high." Carter v. Hewitt, 617 F.2d 961, 966 (3d Cir. 1980). Once the threshold of logical relevancy is satisfied, the matter is largely within the discretion of the trial court. See United States v. Steele, 685 F.2d 793, 808 (3d Cir. 1982). Federal Rule of Evidence 402 states: "All relevant evidence is admissible, expect as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402.

Under Federal Rule of Evidence 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. "Rule 403 does not act to exclude any evidence that may be prejudicial, but only evidence the prejudice from which substantively outweighs its probative value. Prejudice within the meaning of Rule 403 involves identifying a special damage which the law finds impermissible." Charles E. Wagner, Federal Rules of Evidence Case Law Commentary 145 (1996-97) (footnotes omitted).

1. Farahmand's Superiority as a Candidate

Defendants seek to exclude the Plaintiff's proposed testimony concerning his superiority as a candidate for the promotion. Defendants contend that this evidence is irrelevant because the focus is on the particular criteria or qualifications identified by the employer as the reason for the adverse action and not the employee's positive performance in another category is not relevant. See Simpson v. Kay Jewelers, 142 F.3d 639, 647 (3d Cir. 1998) (finding that plaintiff's superior qualifications failed to raise a genuine issue of material fact concerning pretext); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 528 (3d Cir. 1993) (same); Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 689 (D. N.J. 1996) (same). Rather, Defendants submit that the Plaintiff must point to evidence from which a factfinder could reasonably infer that the plaintiff satisfied the criterion identified by the employer or that the employer did not actually rely upon the stated criterion. See Fuentes, 32 F.3d at 767.

This Court disagrees. The case law cited by the Defendants stand for the proposition that, by itself, evidence of a plaintiff's superiority as an applicant does not create a genuine issue of material fact concerning pretext. See Simpson, 142 F.3d at 647; Ezold, 983 F.2d at 528; Dungee, 940 F. Supp. at 689. There is case law, however, that suggests that plaintiff's superior qualifications may be relevant and admissible at trial. See E.E.O.C. v. Trans World Airlines, Inc., 544 F. Supp. 1187, 1220

(S.D.N.Y. 1982). The Trans World court noted:

> The reasonableness or lack thereof an employer's explanations is probative [of pretext]. Thus "[t]he more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as pretext." For example, evidence that the claimant was considerably more qualified for the contested position than the person selected would be probative of pretext because it is unlikely that an employer would exercise its good faith business judgment in such a manner.

Id. (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)); see also Donaldson v. Merril Lynch & Co., 794 F. Supp. 498, 505 (S.D.N.Y. 1992) (noting that plaintiff's superior qualifications is probative of the reasonableness of an employer's action and, thus, may be relevant). Therefore, while this evidence alone may be insufficient to show pretext, the Court finds that this evidence is relevant to pretext because Plaintiff may show that he was "considerably more qualified" for the position than Charalabidis and, thus, it is unlikely that an employer would "exercise its good faith business judgment in such a manner." Id. Accordingly, this aspect of the Defendants' motion in limine is denied.

2. The Performance of Charalabidis as a Supervisor

Defendants' next ask this Court to exclude all evidence relating to Charalabidis' performance after he was promoted to Section Chief. The Defendants contend that Charalabidis' performance since his promotion is irrelevant. The Court agrees.

The courts in this district, and the majority of courts in other districts, have excluded evidence of post-hiring performance. See Bruno v. W.B. Saunders Co., 882 F.2d 760, 768 n.4 (3d Cir. 1989) (concluding that there was no reversible error in the district court's decision to exclude evidence of post-selection performance on the ground that it is irrelevant); Dreger v. Mid-America Club, No. CIV.A.95-4490, 1998 WL 102931, at *4 (N.D. Ill. Mar. 5, 1998) (noting that most courts find that job performance of person selected over plaintiff is irrelevant, but nonetheless reserving decision for trial); Durso v. Wanamaker, No. CIV.A.83-1385, 1985 WL 56665, at *1 (E.D. Pa. Apr. 18, 1985) (finding that evidence of performance of person who succeeded plaintiff was irrelevant in ADEA action because "the legality of defendants' decision to terminate plaintiff must be judged by the facts existing at the time of that decision"); Golletti v. Arco/Polymers, Inc., No. CIV.A.82-2749, 1983 WL 615, at * 2 (W.D. Pa. Sept. 30, 1983) (holding that the post-hiring performance reviews do not prove pretext because "[i]t is only the facts existing at the time of Defendant's decision and leading up to that decision which are relevant to the question of whether Defendant unlawfully discriminated against Plaintiff when it made its decision"). But see Berggruen v. Caterpillar Inc., No. CIV.A.92-5500, 1995 WL 708665, at *5 (N.D. Ill. Nov. 29, 1995) (noting that evidence of job performance of person selected over plaintiff may be relevant

to pretext). These cases essentially hold that evidence of the job performance of a person selected over a plaintiff in an age discrimination suit is irrelevant in the context of employment discrimination, because the inquiry is limited to the knowledge of

the employer at the time it made the hiring decision. See Durso, 1985 WL 56665, at *1.

In this case, the Court finds that evidence of the post-promotion performance of Charalabidis is not relevant. This evidence does not make it more or less likely that the Plaintiff was discriminated against at the time of the hiring decision. Thus, the Court grants the Defendants' motion in limine in this respect.[5]

3. Other Alleged Incidents of Discrimination

Finally, Defendants seek to exclude "other alleged incidents of discrimination." As Defendants concede, many courts have held that other alleged incidents of discrimination may be relevant. See Stewart v. Rutgers State Univ., 120 F.3d 426, 433 (3d Cir. 1997) ("While the district court was correct in finding that any discrimination claim based on [plaintiff]'s 1992-93 tenure denial is time-barred, we reject the notion that the events surrounding that denial are not relevant evidence which [plaintiff] could use at trial [to show the 1994-95 tenure denial was racially discriminatory]."); Glass v. Philadelphia Elec. Co., 34 F.3d 188, 194. (3d Cir. 1994) (noting that evidence of discrimination against other employees or of a hostile work environment is relevant to "whether one of the principal non-discriminatory reasons asserted

[5] In light of the above case law, it is not surprising that the Plaintiff fails to address the Defendants' argument to exclude this evidence in his response to the motion in limine.

by [an employer] for its actions was in fact a pretext for . . . discrimination"); see also United Air Lines v. Evans, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."). Nevertheless, Defendants contend that the "other alleged incidents of discrimination" in this case are irrelevant and unfairly prejudicial.

This Court concludes that it has insufficient evidence to rule on this issue. While Defendants cite some examples of "other alleged incidents of discrimination," the discussion of these examples is brief and general. In response, Plaintiff is even more vague and general concerning his proposed evidence on this matter. Therefore, in an exercise of caution, the Court denies Defendants' motion to exclude this evidence because: (1) courts have held that this evidence may be relevant in certain circumstances and (2) there is "judicial inhospitability" to blanket evidentiary exclusions of this sort in discrimination cases. See Glass, 34 F.3d at 195.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMAD FARAHMAND	:	CIVIL ACTION
	:	
v.	:	
	:	
WILLIAM S. COHEN and LT. GENERAL HENRY T. GLISSON	:	NO. 97-7952

O R D E R

AND NOW, this 10th day of February, 1999, upon consideration of the Defendants' Motion for Summary Judgment and Defendants' Motion in Limine, IT IS HEREBY ORDERED that:

(1) Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**;

(2) Summary Judgment is **GRANTED** in Defendants' favor to the extent that Plaintiff's Title VII and ADEA claims are based upon adverse employment actions, other than the failure to select the Plaintiff as a finalist for Section Chief;

(3) Defendants' Motion in Limine is **GRANTED IN PART AND DENIED IN PART**; and

(4) The Defendants' request to preclude the testimony of witnesses concerning Charalabidis' performance after he was promoted is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON, J.